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EX PARTE OR LATE FILED

January 31, 1997

Meredith J. Jones, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918A
Washington, D.C. 20554

Re: Cable Home Wiring Proceeding
Ex Parte CS Docket No. 95-184/
MM Docket No. 92-260

Dear Ms. Jones:

In its comments in the cable home wiring proceeding and in subsequent *ex parte* meetings with members of the Commission's staff, Cox Communications, Inc. ("Cox") has observed that the Commission does not have authority under the Communications Act to move the demarcation point in multiple unit dwelling units ("MDUs") for the provision of cable service. However, Cox believes that the Commission may nevertheless take steps to enhance competition within MDUs which would be consistent with the legislative intent of Section 624(i) of the Communications Act of 1934, as amended. Specifically, Cox has recommended that the Commission generally prohibit multichannel video programming distributors ("MVPDs"), on a going-forward basis, from entering into exclusive contracts to serve MDUs.[1/] Cox was asked by several FCC staff members to provide a legal analysis of the Commission's authority to take such action. As shown below, because such a prohibition is integral to the purposes of the Act and to the encouragement of facilities-based competition, the Commission has clear jurisdiction to adopt it.

Section 624(i) directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises* of such subscriber."[2/] Cox in its comments noted that Congress

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1/ *See* Comments of Cox Communications, Inc. in CS Dkt. 95-184 and MM Dkt. 92-260, March 18,1996 ("Cox Comments") at 27.

2/ 47 U.S.C. § 544(i) (emphasis added).

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was quite clear that this provision is limited to wiring within the subscriber's individual residence. The legislative history of this provision states:

> In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, *but only the wiring within the dwelling unit of individual subscribers*.[3/]

Thus, any proposal to amend the definition of cable home wiring to move the demarcation point for cable wiring in MDUs to include wiring *outside* a subscriber's unit would contravene clear evidence of Congress' intent and repudiate the Commission's own interpretation of its statutory directive.[4/] But Cox believes that even given the confines of the Commission's present statutory authority, it can take further steps to promote competition within MDUs by prohibiting MVPDs from entering into exclusive contracts with the owners and managers of MDUs.

The Commission Has Authority Under Section 4(i) To Bar Exclusive Contracts Where Such Contracts Interfere with the Effective Implementation of Section 624(i)

Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." This provision has been held to grant the Commission broad authority to adopt rules in furtherance of an explicit statutory provision, even where such rules are not specifically required or authorized by the statute and even where they regulate entities over which the Commission has no explicit statutory jurisdiction. As the United States Court of Appeals for the Seventh Circuit has stated, "Section 4(i) empowers the Commission to deal with the unforeseen -- even if ... that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries."[5/] Thus, long before Congress specifically authorized the Commission to regulate cable television pursuant to Title VI of the Act, the Commission asserted (and the Supreme Court affirmed) "ancillary jurisdiction" under Section 4(i) to

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3/ *Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7349, 7349 (1992) (*citing* H.R. Rep. No. 628, 102d Cong., 2d Sess. ("House Report") at 119 (1992)) (emphasis added). *See Cable Home Wiring Order*, 8 FCC Rcd at 1436.

4/ See Cox Comments at 13.

5/ *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

regulate cable to the extent necessary to implement its explicit statutory functions and policy mandates with respect to broadcasting.[6]

As the Seventh Circuit points out, "Section 4(i) is not infinitely elastic. It could not properly be used to regulate an activity unrelated to the communications industry ... or, as its language makes clear, to contravene another provision of the Act."[7] But neither of those restrictions would apply to a rule prohibiting MVPDs from entering into exclusive MDU contracts with building owners and managers. The activity being regulated is the provision of video programming and other communications services by MVPDs -- an activity for which the Commission is given authority to regulate under the Act.[8] And, the prohibition is not barred by or inconsistent with any provision of the Act. To the contrary, it squarely supports the specific pro-competitive policy and mandate of Section 624(i). If a second MVPD is prohibited by an exclusive contract from competing to provide services in a given MDU, subscribers in that MDU will not derive any benefit from the statutory provision which permits them to purchase their inside wiring when terminating cable service. These are precisely the circumstances in which Section 4(i) authorizes the Commission to act.

The Commission Should Adopt a Prohibition on Exclusive Contracts, with a Reasonable Transition Period for Existing Contracts.

In implementing a regulation which prohibits exclusive contracts between an MVPD and landlords or building owners, the Commission should, however, recognize the legitimate expectations of MVPDs that have entered into exclusive contracts by grandfathering these agreements until the end of their reasonable terms. MVPDs relied upon the expectation that their status in a building as the exclusive video service provider would permit them to realize cost savings and a guaranteed revenue stream. Therefore, MVPDs providing service under exclusive agreements often contract with building owners to provide service to residents of an

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6/ *See, e.g., United States v. Southwestern Cable Co.*, 393 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

7/ *North American Telecommunications Ass'n v. FCC, supra*, 772 F.2d at 1292 (*citing GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1972); *AT&T v. FCC*, 487 F.2d 865, 876-78 (2d Cir. 1973). Because moving the cable demarcation point would in fact contravene an express provision of the Act, Section 4(i) cannot be used as authority that permits the Commission to do so.

8/ Section 2(a) of the Act states that the statute applies "to all interstate and foreign communication by wire or radio. . ." 47 U.S.C. § 152(a).

MDU at discounted rates. And, as part of these "exclusive" arrangements, MVPDs often receive discounted rates from programming services in return for a guarantee of 100 percent penetration within an MDU. It is with this expectation of exclusivity and the concomitant operational savings resulting from, among other factors, fewer truck rolls, centralized billing, marketing savings, lower programming costs, and lower rates to building owners that MVPD providers have negotiated their contracts. Consequently, if the Commission abrogated exclusive contracts of reasonable length in mid-term, MVPDs would not be able to realize a substantial portion of the revenue they relied upon when entering those contracts. They also would face contractual penalties under the provisions of programming agreements which guarantee total penetration within a building. Similarly, building owners and managers would be disadvantaged because they entered into such contracts with the expectation that they were exclusive, and relied on the exclusivity provision in negotiating contractual terms and in determining the manner in which video services would be provided in their building.

Moreover, the Commission lacks the authority to abrogate such agreements when they will run for a reasonable term.[9/] Courts have recognized that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." [10/] Courts consequently look carefully at the relevant statute to determine whether such congressional intent exists. In *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1276-78, (3d Cir. 1974), cert. denied 422 U.S. 1026 (1975), rehearing denied 423 U.S. 886 (1975), the court found that "[t]he Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. . . . [and] the various provisions of the Act [do not] 'imperatively require' that we imply such authorization." The FCC itself recognizes that even where a federal statute authorizes an agency to retroactively modify or abrogate private contracts, the *Mobile-Sierra* doctrine "established a strict 'public interest' standard that a regulatory agency must meet before it can modify the terms of a private contract that had been freely negotiated by the parties. . . .[11/] Accordingly, even where an agency is given such authority (which is not the case here), it may abrogate a contract only if it finds that the terms of the contract 'adversely affect the public

9/ Generally speaking, Cox's MDU contracts are not exclusive and have a five-year term.

10/ *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021 (1967); *see also Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907).

11/ *ACC Long Distance Corp. v. Yankee Microwave, Inc.* 10 FCC Rcd 654, 657 (1995), quoting *FPC v. Sierra Power Co.*, 350 U.S. 348, 354-55 (1956). *See also United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 322 (1956).

interest'." Where an exclusive contract runs for a reasonable term, no public interest concerns are implicated in any event.

Cox, therefore, believes that the Commission has the ability to proscribe exclusive contracts prospectively, and that doing so will enhance the opportunity for facilities-based competition in MDUs. Please let us know if you have questions regarding this analysis.

Sincerely,

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